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Summary
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BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
LEONARD C. WESSON,

Appellant,

v.

WHATCOM COUNTY

Respondents.

SHB No. 239

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of certain conditions of a substantial development permit issued by Whatcom County, came before the Shorelines Hearings Board, W. A. Gissberg, Chairman, Robert F. Hintz, William A. Johnson, Dave J. Mooney, and Chris Smith on June 9, 1977 in Mount Vernon. David Akana presided.

Appellant appeared pro se; respondent appeared through Chester T. Lackey, Deputy Prosecuting Attorney.

Having heard the testimony, having examined the exhibits and being fully advised, the Shorelines Hearings Board makes these

1 FINDINGS OF FACT

2 I.

3 Appellant seeks an after the fact approval of a substantial
4 development constructed by him on a natural shoreline in 1975
5 without authority of substantial development permit. The
6 substantial development consists of a concrete boat ramp and a two
7 story 20 foot long by 12 foot wide by 20 foot high combination
8 boathouse and storage shed built into and rising six feet above an
9 embankment on the shores of Chuckanut Bay in Puget Sound at appellant's
10 residence, 310 Chuckanut Point Road in Bellingham. The concrete
11 bottom floor of the boathouse is eight inches above ordinary high water to
12 which is attached, sloping waterward, a concrete boat ramp following the
13 natural contour of the tidal area. The walls of the boathouse also serv
14 as retaining walls and are connected to an existing concrete bulkhead.
15 A three foot wide second story balcony is located about ten feet above the
16 floor and extends seaward of the existing bulkhead.

17 That portion of the development landward of the ordinary high water
18 mark (OHWM) is in a conservancy environment while that which is seaward
19 of the OHWM is in an aquatic environment.

20 II.

21 The construction of the boathouse, storage, and boat ramp was
22 precipitated by appellant's desire to provide protection from the
23 elements and storms for his 18 foot boat. Appellant began and
24 continued construction until the county ordered him to stop work. In
25 order to legitimize his project, he made application for a substantial
26 development permit on December 22, 1975.

1 III.

2 After a public hearing on March 23, 1976, the Whatcom County
3 Planning Commission made findings that the proposed "development
4 is generally consistent with the applicable policies and criteria
5 established by law for the Shoreline Management Program" and
6 recommended that a permit allowing the project be granted subject to
7 three conditions which were acceptable to the appellant.

8 IV.

9 The wife of County Commissioner McIntyre is a member of the
10 Chuckanut District Interim Zoning Committee which opposed the instant
11 project at both the County and Corp of Engineers levels. Accordingly,
12 when the Planning Commission recommendation came before the County
13 Commissioners at a public meeting the gist of County Commissioner
14 McIntyre's comments, in establishing a public hearing on the matter,
15 was that he had predetermined to reject the planning commission
16 recommendation. After the Board of County Commissioners' public hearing
17 was held, the permit was issued on August 30, 1976, subject to three
18 new conditions as follows:

19 "3. No ramp shall extend seaward of the existing bulkhead.

20 4. The height of the building shall not exceed ten feet above
21 the "average grade level", as defined in the Whatcom County
Shorelines Management Program.

22 5. Must construct no balcony or other fixture that extends
23 seaward of the existing bulkhead."

24 Chapter 8.2.2(c) of the master program provides that after receiving the
25 planning commission recommendations, the Board may:

-6 "Grant or deny the application as recommended, PROVIDED,
that if the Board does not concur with the Commission's

27 FINAL FINDINGS OF FACT, 3
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1 recommendations, the Board may either. (i) refer the
2 matter back to the Commission for reconsideration of
3 any aspect of the matter, or (ii) reject the findings
4 and recommendation of the Commission, stating its
5 reasons therefore and call its own public hearing, and
6 thereafter adopt its own findings and grant or deny
7 the application."

8 The effect of the permit is such that the boat ramp, balcony
9 and the upper portion of the entire structure in excess of ten feet
10 above the "average grade level" must be removed.

11 The County Commissioners also granted appellant a variance from
12 the 25 foot setback requirement of the master program.

13 V.

14 At the time of permit application, the Whatcom County Shoreline
15 Management Program had been adopted by the Planning Commission. On
16 May 27, 1976, the County Commissioners adopted the master program by
17 resolution and forwarded it to the Department of Ecology (DOE). On
18 August 27, 1976, the DOE, by letter, approved the master program. The
19 master program has not yet been incorporated by DOE in the Washington
20 Administrative Code. The pertinent provisions of the master program
21 at the time of permit issuance are ascertainable.

22 VI.

23 The master program admonishes against harmful concentrations of
24 artificial structures on natural shorelines and encourages preservation
25 and protection of recreational and scenic values. Uses which
26 substantially alter the natural character of the shoreline are directed
27 to Urban and Rural areas. Chapter 3.4.3(d), 3.4.5(b). Esthetic
considerations and compatibility with surrounding features are encouraged
from developments. Chapter 7.10 4.E, 7 15.1.E.1, 7.15.1.F.

1 Boat ramps should be made of segmented movable pads and kept
2 flush with the foreshore slope. Chapter 7.10.4. Chapter 7.15.4.A.4
3 provides that:

4 "Private Boat Ramps - Boat ramps are permitted
5 for individual residences where upland slope
6 within 25 feet of ordinary high water mark
7 does not exceed 25% and/or where substantial
cutting, grading, filling or defense works are
not necessary."

8 The intent of the foregoing provision, as explained by a member of
9 the County Planning staff, is to prohibit the construction of boat
10 ramps at the base of "steep cliffs." Otherwise there would be an
11 encouragement for high bank beach residents to construct a boat
12 ramp which would necessitate substantial cutting and grading of the
13 bank in order to provide access to the beach. We note that the
14 master program provision dealing with private boat ramps (Chapter
15 7.15.4A) is phrased in such a manner so as to be read in the
16 alternative. That is, private boat ramps are permitted where:

17 (1) the upland slope is less than 25%; OR, (2) where substantial
18 cutting, grading and filling are not necessary. Since no such
19 substantial cutting, etc., is necessary at the instant site, a boat
20 ramp is permitted by the master program.

21 Boathouses are not allowed waterward of the ordinary high water
22 mark. Chapter 7.12.4.A.4. They are not prohibited in a conservancy
23 environment .

24 The height of dwellings and accessory structures such as the
25 instant boathouse is limited to ten feet measured either by the
26 vertical distance from average grade level to the highest point on
27 the roof or by the vertical distance measured from the highest

1 existing point on the building site to the highest ridge of the
2 roof. Chapter 7.15.4.C.3; 6.2.63.

3 Construction of residential developments is to be setback a
4 minimum of 25 feet from OHWM and such developments are discouraged
5 from locating therein. Chapter 7.15.1.E.2, 7.12.4.A.4.c. Appellant
6 has received a variance from the foregoing setback provisions.

7 Residential development and accessory uses should not be permitted
8 over water unless they are shoreline dependent, such as piers and
9 floats for recreational or personal use. Chapter 7.15.1.E.2.

10 VII.

11 A rocky promontory juts out at each side of appellant's beach and
12 forms a pocket in which appellant's structure and boat ramp are located.
13 The upland slopes steeply (in excess of 25%) upward from the beach.
14 Neither the lateral drift of sand, rocks or other material along the
15 beach nor the profile of the beach is or will be affected by the boat
16 ramp, even though storm wave action has eroded 20 feet into a portion
17 of appellant's bank landward above the existing bulkhead. The natural
18 contours of the shoreline would not be subject to substantial cutting,
19 grading, filling or defense work to allow the boat ramp sought by
20 appellant. He seeks to store the boat near the water and does not
21 seek to provide vehicular access for launching and retrieval purposes
22 which access would require substantial cutting and grading. A similar
23 ramp on low bank would have been allowed by the county. Thus, the
24 solid concrete boat ramp is not inconsistent with the intent and
25 reasons for the non-mandatory and permissive provisions of the master
26 program; nor does the ramp cause or threaten any adverse effects to
27 the environment.

1 VIII.

2 The substantial development is less than ten feet above the
3 vertical distance measured from the highest existing point on the
4 building site to the highest point on the roof. Therefore, the
5 structure is not inconsistent with the master program provision
6 regarding height limitations irrespective of the parties'
7 interpretation to the contrary based upon the "average grade level",
8 which is but one of two alternative measurement methods.

9 IX.

10 The master program provision admonishes against developments over
11 water. During high tides, appellant's decorative balcony and building
12 eaves do extend over water about three feet. In view of the non-
13 mandatory nature of the master program language upon which the condition
14 in the permit is based, and the small balcony overhang which occur during
15 high tides, we find that the balcony or other fixture seaward of the
16 existing bulkhead do not violate the purpose for which we conceive
17 the master program's discouragement of over water construction to have
18 been developed

19 X.

20 The view from the water has been changed from that of a natural
21 shoreline to include a tastefully designed structure which blends well
22 into the background We find that the view is not impaired nor is
23 what is seen esthetically displeasing notwithstanding the characterization
24 of the boat ramp to an observer one fourth mile across the bay as a
25 "white gash" in the shoreline.

XI.

1 Any conclusion of law which should be deemed a Finding of Fact
2 is hereby adopted as such.

3 From these findings the Board makes these

4 CONCLUSIONS OF LAW

5 I.

6 The Board has jurisdiction over the persons and over the subject
7 matter of this proceeding.

8 II.

9 The proposed development is tested for consistency with the policy
10 of the SMA, the DOE Guildelines and the master program so far as can be
11 ascertained. RCW 90.58.140(1)(a). Permit conditions imposed must also
12 be consistent and, in addition, be reasonable in view of the purposes
13 sought to be achieved. Although the project as submitted already exists
14 the Board has considered this matter and tested it as though it had not
15 been constructed. Appellant's defiance of the law by commencing
16 construction before securing any permits is not condoned. He has already
17 been financially penalized for his action and, in addition, is risking
18 abatement of the structure.

19 III.

20 Based upon the evidence heard as applied to the contentions submitted,
21 we conclude that conditions 3 (relating to no ramp beyond existing bulkhead
22 and 5 (relating to no balcony or other fixture beyond existing bulkhead) are
23 not reasonable and should be stricken. Condition 4 should be amended to
24 adopt the definition of the master program as follows:

25 "The height of the building shall not exceed ten feet
26 above the "average grade level" or the highest existing
point on the building site to the highest ridge of the roof.'

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1 IV.

2 The appearance of fairness doctrine is not violated even though
3 the decision maker may be biased in a particular matter. Whether the
4 bias is such so as to require a reversal of their actions is dependent
5 upon the facts of each case. At any event, the procedure of the master
6 program now before us contemplates that the County Commissioners may
7 reject, out of hand, a planning commission recommendation and call its
8 own public hearing and thereafter adopt its own findings and grant or
9 deny the application. While this procedure may very well lend itself
10 to a charge of bias, none in law does exist. Furthermore we note
11 that the legislature of this state has mandated local governments to
12 follow this identical procedure in its consideration of plats and
13 subdivisions. RCW 58.17.100.

14 V.

15 We note in passing that there was no issue raised relating to
16 applicability of the variance procedures once a master program had
17 been duly approved by DOE in accordance with applicable law. It may
18 be that the variance procedures do not apply in this matter in any
19 event. We have recognized the onerous burden which must be carried by
20 those seeking a variance from a duly approved master program. See
21 Spencer v. Department of Ecology, SHB 242. Further developments such
22 as appellant's must be tested against these additional stricter
23 standards insofar as variances are concerned.

24 VI.

25 Any Finding of Fact which should be deemed a Conclusion of Law
26 is hereby adopted as such.

27 From these Conclusions the Board enters this


ORDER

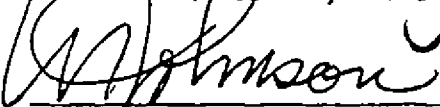
The substantial development permit issued to Leonard C. Wesson is remanded to Whatcom County to strike conditions 3 and 5, and to modify condition 4, as provided in Conclusion of Law III.

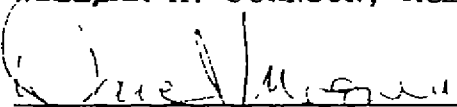
DATED this 1ST day of July, 1977.

SHORELINES HEARINGS BOARD


W. A. GISSBERG, Chairman


ROBERT F. HINTZ, Member


WILLIAM A. JOHNSON, Member


DAVE J. MOONEY, Member


CHRIS SMITH, Member

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